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SUBJECT: KRG LAW ESTABLISHES FRAMEWORK FOR INCREASED JUDICIAL
INDEPENDENCE

This is an Erbil Regional Reconstruction Team (RRT) cable.

SUMMARY AND COMMENT

¶1. (SBU) In November 2007 the Kurdistan Regional Government (KRG) passed a law separating the judiciary from the executive. Specifically, the Judicial Power Law (JPL) establishes a Judicial Council (KJC) to take over responsibility for the management of judges and courts from the KRG Ministry of Justice (KMOJ), and redefines the court structure. An efficient and independent judicial system will contribute to addressing concerns about the Kurdistan Region raised in the Department's Human Rights Report and other assessments, including corruption, political party influence, gender violence, and transparent free market engagement, by allowing individuals and entities to advocate for their rights in a more neutral forum.

¶2. (SBU) While the JPL represents a step forward in the development of rule of law in the region, there will in practice remain ways that the KRG executive branch might interfere with or limit judicial independence, such as the appointment of judges. The new judicial structures created by the law will also face the same problems with developing administrative capacity that have been identified at the national level. The USG should take steps to acknowledge and support this move towards an independent judiciary, and assist in developing the administrative and professional skills needed by the KJC and other entities. END SUMMARY AND COMMENT.

The Justice System in Kurdistan Region Since 1991

¶3. (U) In 1991, the "no-fly zone" effectively severed the legal system of the Kurdistan Region from the national Iraqi system. A number of Kurdish political parties took advantage of the opportunity afforded by the no-fly zone to establish a regional government. Law 1 of the Kurdistan National Assembly (KNA) in 1992 enumerated the legal foundation for the region's government autonomous from the central Iraqi government (GOI). All existing national laws of Iraq prior to 1991 were reviewed by a committee and only those that were endorsed by the KNA became law in the region. After 1991, laws passed by the GOI could only become law in the Kurdistan Region if the KNA endorsed them. In addition, the KNA began generating its own regional laws at the rate of approximately 18 to 20 per year. The Iraqi Constitution of 2005 endorsed the laws passed in the Iraqi Kurdistan Region between 1991-2003, including the law that created an endorsement process for all subsequent national Iraqi laws, and further acknowledged the region's authority to generate laws outside of areas set aside for exclusive federal authority.

¶4. (U) In 1994-96, fighting between the two largest Kurdish political parties and their affiliates resulted in the division of the regional government into two distinct administrations, one under the Patriotic Union of Kurdistan (PUK), dominant in Sulaimaniyah, and one under the Kurdistan Democratic Party (KDP), dominant in Erbil and Dohuk. The divided administration continued for several years after peace was restored, but in 2005 the parties agreed to start combining administrations. The two party-led Ministries of Justice merged into the KRG's Ministry of Justice (KMOJ) in 2007. Prior to the passage of the JPL in late 2007, the KMOJ managed the courts and judiciary. The court structure evolved to include a regional Court of Cassation in Erbil as the highest court in the Kurdistan Region, and two Courts of Appeal managing a lower system of courts in their respective geographic jurisdictions of

Dohuk/Erbil and Sulaimaniyah.

¶5. (U) The KMOJ organic law includes a provision for a Justice Council - not to be confused with the new Judicial Council. Chaired by the Minister of Justice, the Justice Council controlled budgeting, staffing, training and policy for judges, prosecutors, and judicial investigators along with the courts, offices, labor organizations and logistical considerations that are affiliated with these positions. A 2006 report of the American Bar Association's Iraq Legal Development Project concluded that in Kurdistan "[t]he judiciary is completely dependent on the MOJ."

A More Independent Judiciary

¶6. (SBU) The Judicial Power Law (Law 23 of 2007) establishes a structure with ten classes of courts in the Kurdistan Region. The Court of Cassation, with six standing Chambers, remains the highest court. Below it are four Courts of Appeal at the head of each provincial governorate in the region, including a projected presence in Ta'mim (Kirkuk) Governorate. (Comment: this legislative overreach shows the outcome Kurdish legislators would prefer regarding Article 140. End Comment.) Each Court of Appeal manages eight classes of court within its jurisdiction, including felony, personal status, juvenile and investigative courts. To date the KJC has not moved to establish the new Courts of Appeal.

¶7. (SBU) Most significantly, the JPL establishes a Judicial Council (KJC) with levels of independence that exceed in some respects those enjoyed by U.S. state courts. Other provisions, however, assign the MoJ and KRG Presidency roles that some members of the legal community worry will be used to limit independence. For example, the Director of Public Prosecutions, a ministry employee, holds a seat on the KJC. (The Chief Justice of the Court of Cassation is the Chairman of the KJC, and seven other members are active judges from both the Court of Cassation and the four Courts of Appeal.) Additionally, the JPL gives the KRG President the power to appoint judges based on nominations received from the KJC. This power is limited by the fact that the JPL delineates 10 criteria for lower

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judges and several additional requirements, including at least 20 years of experience, for judges that are members of the Court of Cassation. These types of checks and balances can be a healthy part of the system, but it will take time for the KJC to perform its role effectively in the face of a historically powerful and well-funded executive.

¶8. (U) The JPL requirement for judicial education creates an immediate need for the KRG to develop a training facility since the region's judges have been isolated from the Judicial Training Institute in Baghdad since 1991. The system will have to address the issue of judges who were appointed out of necessity without the requisite certification between 1991 and 2003. Moreover, the JPL's lowering of the mandatory retirement age may create a shortage of judges. For example, the law forced the retirement of both the former Chief Justice of the Court of Cassation and one of the Deputy Chief Justices.

¶9. (SBU) According to Article 34 of the JPL, the KJC is responsible for creating a budget and submitting it to the KNA for approval. In practice, the acting head of the KJC told RRTOffs that there was pressure for the KJC to submit its budget to the KRG's Ministry of Finance (KMOF), with review by the KMOJ, prior to submission to the KNA. While not strictly in accordance with the JPL, this arrangement may reflect a pragmatic effort to fill gaps in the KJC's administrative capabilities. Recently, the KJC split the difference by submitting its budget simultaneously to the KNA and the KMOF.

Challenges to Implementation

¶10. (SBU) The region's judiciary faces three key challenges in implementing the new system. As noted concerning the development of its budget, the KJC and existing courts are poorly positioned by decades of dependence on ministries and other executive agencies to create and execute budgets, and handle other administrative tasks of an expanding court system. The courts in the Kurdistan Region are aware of these challenges, but they do meet these new needs. Another challenge stems from the ill-defined or rudimentary ways legal institutions interact, such as clear procedures for the judiciary to mandate police action in specific instances or judicial police in line with European civil law systems. The final challenge is political. As a result of the forced retirements and new positions created by the JPL, the new KJC only has four of the mandated nine members, and the process of filling the vacant seats

remains contentious. Several high level court contacts have reported to RRTOffs that there are political and personal issues involved in the stalemate. How these positions are filled and who fills them will indicate how much independence the KRG leadership and the dominant political parties will allow.

Lack of Linkages Between the National and Regional Judicial Branches

¶11. (SBU) The law does not address the gaps in the civil and criminal procedural codes between the regional and national justice systems or more broadly clarify the relationship between regional and federal (Iraqi) courts. Citizens and institutions in the region remain unable to access national level legal institutions, including the Supreme Court, via a transparent process since there is no procedural framework for parties to appeal to the federal Supreme Court. The ranking justice on the KJC told RRTOffs that he was receptive to a much stronger professional relationship between the KJC and the Higher Juridical Council (HJC) in Baghdad. This would be a long-overdue first step towards reconciling systems that ultimately need to be clearly and closely linked.

¶13. (SBU) There is a correlation between the increased profile of judicial independence at the national level and developments at the regional level. The primary differences in the enabling legislation for the KJC and HJC are that: 1) the KJC has an executive branch officer as a member whereas the HJC membership consists solely of judicial officers; 2) the HJC has sole authority over the training and certification of judges whereas in the Kurdistan Region a law assigning this function has not been passed; and 3) the Kurdistan Region's JPL allows the KJC to submit its budget directly to the legislature whereas the HJC coordinates its budget with the Ministry of Finance.

Proposed USG Action

¶14. (SBU) Judicial contacts acknowledge that the creation of an independent judiciary in Baghdad with strong USG support spurred similar action in the Kurdistan Region. The RRT recommends that the USG acknowledges the progress demonstrated by the passage of this JPL in conversations with KRG leaders and in annual human rights reporting, encourages a transparent process for filling the current vacancies in the KJC, and identifies technical and financial support to develop the administrative capabilities and the infrastructure necessary for an effective judicial branch in the Kurdistan Region. We should also encourage European countries such as France and Germany with civil code laws systems to support the regional judiciary as they expand their presence in Erbil.

¶15. (SBU) In the short term the RRT is working with the KJC and Rule of Law partners in Baghdad to foster a linkage between the KJC and the HJC in Baghdad. The RRT proposes that the two institutions should be encouraged to work together to solve shared problems relating to court administration, judicial administration (professional development and training) and procedural issues facing a federal Iraq. This could begin with a series of video-conferences between the two bodies to establish a foundation for later

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discussions.

COMMENT

¶16. (SBU) Under the Judicial Power Law, the KJC is balanced by the legislative branch through its budgeting process, and by the executive branch in the final endorsement of judges. It has yet to be determined what role the KJC or newly independent court system will be able to have as an effective check on the legislative and executive powers. A stronger role for the Judiciary, but also for the KNA as a legislative body and balancing force, will be increasingly important to put the Kurdistan Region on a path towards transparent and accountably democracy. While the U.S. and others can encourage this course, developing a truly independent judiciary in the region, as in the rest of Iraq, will require strong political will and cultural change after years of domination by the executive branch. END COMMENT.

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